IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 741 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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STATE OF GUJARAT - Appellant(s)
Versus
KALUSING BHAVSING & 4 - Opponent(s)

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Appearance :
MR KT DAVE, LD.APP for Appellant(s) : 1,
MR NITIN M AMIN for Respondents.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 19/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. Heard Mr.K.T. Dave, learned Additional Public Prosecutor, appearing on behalf of the

appellant-State and Mr.Nitin Amin, learned counsel appearing for the respondents.

2. This is an appeal preferred by the appellant-State under Section 378 of the Code of Criminal Procedure, 1973, against the judgment and order of acquittal dated 18th March, 1986, passed by the learned Additional Sessions Judge, Ahmedabad (Rural), Narol at Ahmedabad, in Sessions Case No.123 of 1985, whereby the learned trial Judge acquitted five accused persons from the charge of offence punishable under Sections 147, 148, 149, 307 and 323 of the Indian Penal Code.

3. The judgment and order under challenge is assailed on various grounds mentioned in paragraph no.5 of the memo of the appeal. Mr.K.T. Dave, learned Additional Public Prosecutor, has taken us through the grounds of challenge as well as the reasons assigned by the learned trial Judge for recording acquittal. The learned trial Judge has evaluated oral as well as documentary evidence

in detail. We are taken us through the relevant part of the oral evidence of important prosecution witnesses relied on and the medical evidence as to the injury inflicted on the person injured i.e. Idalkhan. When an injured eye-witness is found to have been corroborated by other witnesses and also by medical evidence, the learned trial Judge ought to have convicted the accused persons, is the sum and substance of the submissions made by Mr.K.T. Dave, learned Additional Public Prosecutor.

4. To appreciate the arguments placed before us, we would like to state the facts that were placed before the learned trial Court. These facts are reflected in paragraph no.1 of the judgment and order under challenge. For the sake of brevity and convenience, we would like to reproduce the relevant part, which is as under :

> “The first informant Ayubkhan Idalkhan-herein after referred to as

complainant, residing at Virochannagar, Taluka Sanand, District Ahmedabad- is an agriculturist by an occupation. They are four brothers out of whom eldest is himself, the second is Afazalkhan, the third one is Nazirkhan and youngest is Nizamkhan. All the four brothers are residing with their parents. On 3rd April, 1985 at about 9-00 p.m. the complainant had been at his house-residential place. He knew that there was quarrel with his father an so he was going to Panchayat office. At that time on the way behind the Thakorji Temple where there is road, he found his father Idalkhkan who was injured and bleeding. At that time, Kamjikhan Umarkhan and Rahimkhan Gulabkhan of their locality were there. Thereafter, he inquired from them as to who has beaten his father, whereupon Kamjikhan informed him that the accused of his village had beaten Idalkhan. He also

stated that the accused no.1 and 2 are armed with dharias and also added that the accused no.1 inflicted dharia blow to Idalkhan, and also further informed that the accused nos.3 to 5 have inflicted stick blows to injured Idalkhan. He had seen the injuries on the body of Idalkhan and found that Idalkhan had injuries on head, behind the right ear and also on back and on upper part of right arm. So the complainant, Kamjikhan, Rahimkhan and Liyakatali had taken injured Idalkhan to Government dispensary at Sanad and the complainant had been to poilce station, Sanand and lodged first information report."

5. According to us, the finding recorded by the learned trial Judge based on good and convincing reasons and we have not found any grave or material error in appreciation of the evidence made by the learned trial Judge.

There is no perversity or illegality in the finding. It is argued by Mr.Amin, learned counsel appearing for the respondents, that as per the settled legal position, this Court should go very slow in reversing the order of acquittal, especially when the acquittal recorded by the learned trial Court is based on logical and legal inferences. The learned trial Judge has appreciated various aspects for recording acquittal and we have tested the reasons assigned by the learned trial Judge on the touchstone of our satisfaction before saying that there is no element of perversity or illegality in the finding.

6. The incident in question, as per the say of the prosecution, has occurred at about 08-30 p.m. on 04th April, 1985 in a small village. When the injured PW-Idalkhan was leading to his home on completion of his alleged visit of panchayat office, he was assaulted. There was no evidence to show that the village where the incident had occurred i.e. Virochannagar, had street lights and that too at the place of

incident. The injured, after incident and assault by scythe (Dhariya) was taken to Municipal Hospital, Sanand and it is not the case of the prosecution that the injured was all throughout unconscious till he was shifted to Sanand Hospital. It is not in evidence that somebody from family, relatives or friends have tried to approach Sanand Police Station when the injured was taken to Sanand Hospital for treatment. He was admitted in hospital and treated by Dr.Ajay Gandhi, PW-1, in early hours on 03rd April, 1985 immediately after midnight at 04-30 a.m. It is in evidence of Dr.Gandhi that the person injured was conscious. While giving history as to the assault made on him, neither the names of the accused were disclosed on the first available opportunity nor it is there on record that he did refer to the names of accused but the doctor did not write in the history. Same opportunity was available to the injured when he was taken for treatment to Vadilal Sarabhai Hospital. It is true that probably he might

have been taken to the hospital with a transfer note but the evidence of Dr.Pradeep Seju, PW-2, who admitted the injured witness in the hospital, was not informed about the involvement of the respondent-accused while giving history. None of the relatives of the injured witness who had accompanied the injured to Vadilal Sarabhai Hospital had informed the police when normally available at the hospital immediately, about the involvement of one of these two accused. When the injured victim was shifted to Vadilal Sarabhai Hospital, Ahmedabad, the injured was conscious and Dr.Pradeep Seju has stated that the injured victim was not unconscious at any moment. It is also noted by the doctor on the case papers that speech of the injured was normal. On the contrary, it is in evidence that one Police Sub Inspector Hathiji Chavda had tried to record a statement of injured witness Idalkhan and under a strange circumstance, the injured had conveniently avoided that situation. It appears that on

the insistence of the police officer, he was informed in writing that as he is not still stable, (mentally not stable-surprisingly), the officer should come on the next day and thereafter, the police officer had said that he would come on the next day for recording his statement. This conduct of the complainant is not only strange or surprising, but such a conduct goes to the credibility of the witness and his loyalty to the truth.

7. The proceeding of a criminal trial is nothing but a fact finding exercise and ultimately, the goal of the Court is to reach to the truth and if it is found that the accused charged or any of them are guilty of the offence, then appropriate order of conviction should be passed. But in the case of such a complainant or injured witness, it become difficult for the Court to arrive at a positive finding, especially when no other cogent and convincing evidence is available on record. The statement of injured witness Idalkhan has been recorded

on 08th April, 1985 i.e. on the 06th day from the date of incident. The delay in filing FIR in the present case goes to the root of the strength of the case. It appears that the police was not informed initially with the names of the accused persons and a 'vardhi' was recorded by Sanand Police. It emerges from evidence that the police was informed about some communal disturbance that had taken place at Virochannagar but at the visit of the Police Inspector, son of the complainant i.e. Ayubkhan, lodged the complaint. The date of recording of FIR is 03rd April, 1985. The incident has occurred at between 09-00 p.m. and 09-30 p.m. on 02nd April, 1985. Firstly the injured was taken to the Civil Hospital at 00-40 hours on 03rd April, 1985. Undisputedly, the FIR has been registered at 01-30 a.m. on 03rd April, 1985. Of course, apparently there is no delay in lodging FIR but the FIR is considered in the background of the fact that even as per the complainant Ayubkhan, he came to know about the names of the assailants from

PW-Kabjikhan of the very village itself and that too, before the injured was brought to home before shifting him from Municipal Hospital, Sanand. The names of the accused could have been disclosed before the doctor and the police also could have been intimated about the assault made by the respondents-accused persons along with the names of the assailants. It appears that the names of the assailants have been given to the police probably under consultation with injured after his admission in the hospital. The case papers of Vadilal Sarabhai Hospital produced in evidence reveals that the patient had already reached Vadilal Sarabhai Hospital, Ahmedabad, at 02-35 a.m. on 03rd April, 1985. So the injured must not have been given all necessary treatment at Sanand Municipal Hospital and all of them must have left Sanand for Ahmedabad. Considering the geographical distance between Sanand and Ahmedabad, and the very entry point of Ahmedabad to Vadilal Sarabhai Hospital, the complainant hardly had time to describe the

incident in detail as it is found in the complaint registered by Sanand Police. In the background of this set of facts, time taken by the complainant nearly about 4½ days in filing the complaint was required to be considered. However, the learned trial Judge has observed that the complainant and/or injured had not disclosed the names of the assailants at the first available opportunity or at the earliest. Disinclination to give detailed version by the injured on the previous day i.e. on 07th April, 1985, gives one impression that either injured was avoiding to give statement or the Investigating Agency was not that careful in paying visit to the hospital to get the version of the injured witness. Both these contingencies affect adversely to the case of the prosecution.

8. If the evidence of injured witness Idalkhan who was lonely when assaulted is appreciated, there are number of infirmities. It is true that the accused can be convicted on the sole

testimony of a witness and in the present case the prosecution case is mainly based on the version of the injured Idalkhan.

9. It is relevant to note that the injured Idalkhan has accepted in his deposition that he cannot see through his right eye since his childhood. It is true that one can visualise the incident and give details of the same with one eye but the visibility of the area is always limited. In this background, we would like to mention the infirmities pointed out by Mr.Amin, which are as under :

(i) The injured has tried to explain the delay in recording his statement. However, he has failed miserably in his attempt. As per his evidence, he regained consciousness after 3 to 4 days in V.S.Hospital. However, as stated hereinabove, the evidence of Dr.Gandhi, PW-1, Dr.Pradeep PW-2, and P.S.I. Chavda PW-8 has falsified the

say of the injured.

(ii) It is the say of the injured that the accused nos.1 and 2 had given scythe (dhariya) blow and thereafter, he became unconscious and fell down. Thereafter, the accused nos.3,4 and 5 gave stick blows. It is highly improbable that after the person becomes unconscious and fell down, and still he could know as to who gave the stick blows to him.

(iii) The injured has tried to improve his version by saying for the first time in his evidence that the accused no.1 had told him that 'you are to be finished'. Thereafter, he gave the scythe (dhariya) blow. It is proved on record that the injured has not stated like this in his police statement and the said contradiction is proved in the evidence of the Investigating Officer.

(iv) The injured has also stated for the first time in his evidence that the accused no.2 gave scythe (dhariya) blow on his ear. However, it is proved in the evidence of the Investigating Officer that this fact was also not stated by him in his police statement.

(v) The reason to go to the place of the incident by the injured is also not believable. The injured was Deputy Sarpanch. According to him, the time of the Panchayat office would be 11-00 a.m. to 05-00 p.m. The injured has further stated that since the Talati was not present, the Panchayat office was closed. It is highly improbable that the injured who was Deputy Sarpanch at the relevant point of time would not be aware about the fact that no Government office or employees work at 08-30 p.m. The injured was Deputy

Sarpanch and was bound to know the said fact and, therefore, it is highly unnatural that the injured would go to Panchayat Office at such an odd hour.

(vi) The injured has given the cause of this incident as enmity because of the election. However, it is admitted by the injured in his evidence that none of the accused had contested the election against him. There is no evidence on record that the accused had supported any candidate who contested the election against the injured.

(vii) It is admitted fact that the son of the injured was accused in Sessions Case wherein the allegation against him and PW-4 and PW-5 were of firing, causing injuries, causing damages and the offences of rioting, etc. There are communal ill-feeling on the day of incident i.e. on 02nd April, 1985.

(viii)That the conduct of the injured was also highly unnatural as, though he has admitted in his evidence that the accused no.1 told him that he should be finished and as a result of which he was afraid and yet he did not run shouting “save, save” though the accused were at a distance before the actual assault had taken place.

10. The learned trial Judge has rightly observed that the medical evidence does not corroborate the say of the complainant. The injured say that he was unconscious and was not in a fit state of mind when taken to Sanand and was taking treatment at Vadilal Sarabhai Hospital at Ahmedabad. When this version is found falsified by two doctors i.e. Dr.Ajay Gandhi and Dr.Pradeep Seju, it would not be possible for the Court to accept that the injured had sustained such a grave injury that he had remained unconscious and remained ill mentally for several days. Of course, we accept the say

of Mr.K.T. Dave, learned Additional Public Prosecutor, that some error committed by the doctors in describing the nature of wound found on head i.e. vital part of the body, of the person injured would not make injury less grave. The Court should look to the size of the wound and the weapon used. The injured had sustained fracture on right parietal bone. One injury was found of the size 10 cms. X 2 cms. X 2 cm. and second injury was of 3 cms. X 0.5 cm. X 0.5 cm. The first injury was on frontal parietal region and the another was from the backside i.e. behind the right ear. Both injuries are possible by one weapon and one individual. Number of injuries found on the body of the person injured rules out the possibility of severe beating by 5 accused persons. There is contradiction as to who gave the first blow and on which part of the body. This contradiction even if is ignored then the fact remains that the identity of the assailants is even doubtful by the learned trial Judge. For the following infirmities,

we are of the view that the learned trial Judge has rightly not accepted the evidence of PW-4-Kamjikhan Umarkhan at Ex.18 and PW-5-Rahimkhan Gulabkhan at Ex.19, as reliable piece of evidence :

(i) PW-4 Kamjikhan has stated in his evidence for the first time that the injured Idalkhan was walking ahead of him and that is how he saw the incident. However, this statement made by him is for the first time during his evidence and he has not stated like this in his police statement. This contradiction is proved.

(ii) PW-4 Kamjikhan has admitted in his evidence that after the accused-assailants ran away from the scene of offence, PW-5 Rahimkhan came to the spot. Thus, this witness is denying the presence of PW-5 Rahimkhan at the time of incident of assault and thus according to him PW-5 was not an eye-witness.

(iii) Similarly PW-5 Rahimkhan has also stated in his evidence that after the accused ran way PW-4 Kamjikhan came to the scene of offence. Thus, according to PW-5 Rahimkhan, Kamjikhan PW-4 was not the eye-witness.

(iv) Both the so-called eye-witnesses have stated in their evidence for the first time before the Court that the accused nos.3, 4 and 5 had given 4 to 5 stick blows on the right portion below the shoulder (Bavdu) as well as on his back portion. This contradiction in the evidence of both the eye-witnesses is proved through the evidence of PSI Chavda.

(v) Rahimkhan PW-5 has also not stated before the Police about the injury caused by accused no.1 and 2 by scythe (dharia) on the person injured. However, he deposited like that for the first time in his evidence before the Court and that contradiction has

been proved through the evidence of PSI Shri Chavda.

11. Undisputedly, the son of the injured Idalkhan is not an eye-witness. Considering the relations and the communal feeling which was prevailing at the relevant point of time, when the incident occurred, the evidence of these three witnesses, i.e. PW-4, PW-5 and the complainant, is required to be scrutinized closely and this part is to be appreciated in appropriate way. Absence of blood at the scene of offence also makes the incident doubtful. The change in the place of incident has been treated as a major infirmity by this Court and the Apex Court in number of cases. No motive has been proved. It is submitted that the injured was Deputy Sarpanch and having some role in certain class of community and hence, he was assaulted on account of ill-feeling prevailing between the people of two different religions. It is true that the motive is not either required to be pleaded or to be proved in the case of direct evidence. But when the

motive is specifically pleaded, then the prosecution should try to prove it substantially. No convincing evidence as to the motive has come on record.

12. The reasons recorded by the learned Judge are logical and there is no element of perversity or patent illegality. The Apex Court in a decision in the case of ***Dwarkadas v. State of Haryana, reported in (2002) 1 SCC 204***, has reiterated the principles of law where it has been held that the judgment and order of acquittal normally should not be reversed merely because the other view is possible. In the same way, the observations of the Apex Court in the case of ***Kanshiram v. State of Madhya Pradesh (Re.Para-21), reported in AIR 2001 SC 2902,*** in respect of appeal against the order of acquittal, positively would help the accused. As per the settled legal position, while appreciating the order of acquittal, the Court should go slow in reversing the order of acquittal unless the order is absolutely illegal and perverse. In view of the ratio of the above cited decisions, there is no merit

in the present Appeal and the same is required to be dismissed.

13. In view of aforesaid discussion and observations, the present appeal is hereby dismissed. The order of acquittal dated 18th March, 1986, whereby the learned Additional Sessions Judge, Ahmedabad (Rural), Narol at Ahmedabad, is hereby confirmed. The bail bond, if any, stands cancelled.

(C.K. Buch, J)

(K.A. Puj, J)

Aakar